Supreme Court, U.S.
FILED
AUG 19 1999
OFFICE OF THE CLERK

(16)

No. 98-1648

IN THE
Supreme Court of the United States

GUY MITCHELL, *et al.*, *Petitioners*

v.

MARY L. HELMS, *et al.*, *Respondents.*

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS GUY MITCHELL, ET AL.

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INTEREST OF AMICUS*

The American Center for Law and Justice ("ACLJ") is an international, non-profit legal organization whose purpose is to preserve, protect and promote religious liberty through education, litigation, legislative assistance, and related activities. ACLJ attorneys have participated in cases involving

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* Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution in federal courts throughout the country. The ACLJ represents the interests of its thousands of donors across the country.

Specifically, the ACLJ's Chief Counsel, Jay Alan Sekulow, has served as lead counsel and presented oral arguments before this Court in the following cases: *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 855 (1997); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 224 (1990); *United States v. Kokinda*, 497 U.S. 720 (1990); and *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

Consequently, the ACLJ possesses expertise relating to the Establishment Clause of the First Amendment to the United States Constitution. As *Amicus Curiae*, the ACLJ's expertise in Establishment Clause cases would assist this Court in analyzing the relevant case law regarding this important decision. The ACLJ files this brief in support of the Petitioners and urges this Court to reverse the lower Court's holding to make clear that neutral distribution of educational equipment to public and private students does not violate the First Amendment.

SUMMARY OF ARGUMENT

In evaluating the constitutionality of Chapter 2, 20 U.S.C. §§ 7301-7373 and its Louisiana counterpart, La. Rev. Stat. Ann. §§ 17:351-52 as applied to Jefferson Parish, the Fifth Circuit in this case relied exclusively upon *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). Considering itself bound by the holdings of those cases, the Fifth Circuit conclusively and categorically prohibited loans of instructional equipment and materials, including library books and transparencies, to religious school students, while upholding the loan of textbooks. *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998). The Fifth Circuit determined whether the aid was constitutional based solely on the character of the aid itself. *Id.* at 372. This led the court to conclude that the First Amendment allows the state to loan textbooks, but not library books, to religious schools.

Even if the Fifth Circuit was obliged to follow *Meek* and *Wolman*, this Court should reject the Fifth Circuit's conclusion that the Constitution makes the picayune distinction between textbooks and transparencies. This Court's Establishment Clause jurisprudence regarding government aid to religious schools has developed significantly since *Meek* and *Wolman*. This Court has clarified that the permissibility of aid to religious school students does not depend solely on the character of the aid. Rather, the underlying principle of government neutrality toward religion governs this Court's Establishment Clause analysis. The Court properly has recognized that while government may not be able to favor

religious institutions, the First Amendment does not allow government to be hostile to religious institutions.

Based on the criteria this Court now considers to evaluate whether government aid has the effect of advancing religion, the loan of educational materials in this case is perfectly proper under the Establishment Clause. The loan of materials here does not constitute government indoctrination or create an excessive entanglement between church and state. Most importantly, the educational materials are provided entirely without reference to the recipients' religious affiliation; the program treats religious and non-religious private schools, and the students that attend them, exactly the same. *Agostini v. Felton*, 521 U.S. 203, 234-235 (1997).

This Court should reverse the Fifth Circuit's decision, reaffirm that the analysis set forth in *Agostini* must be applied to government aid programs such as Chapter 2, and formally overrule *Meek* and *Wolman* to the extent those decisions are inconsistent with the Court's current understanding of the Establishment Clause. To affirm the Fifth Circuit's rigid distinction between textbooks and other instructional materials would exhibit not neutrality, but hostility toward religion, a result this Court's present Establishment Clause jurisprudence emphatically rejects.

ARGUMENT

> One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of

> religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion–at least while this Court sits.

Meek v. Pittenger, 421 U.S. 349, 387 (1975) (Burger, C.J., concurring in part and dissenting in part).

The "future date" that Chief Justice Burger spoke of twenty-four years ago already has arrived. This Court in several cases subsequent to *Meek* and *Wolman*, and specifically in *Agostini*, has "come to a more enlightened and tolerant view" of government aid-to-education programs. No longer is government aid to religious school students presumptively unconstitutional because of the religious character of the institution they attend. Rather, religious school students may receive government aid on an equal basis with other students, so long as the aid satisfies the three criteria established in *Agostini* to ensure government neutrality toward religion.

I. THE ESTABLISHMENT CLAUSE ANALYSIS MANDATED BY THIS COURT IN *AGOSTINI v. FELTON* GOVERNS THIS CASE.

A. The Three-Part Establishment Clause Test Articulated in *Agostini* Determines the Constitutionality of a Government Aid Program.

Even if the Fifth Circuit was obligated to follow this Court's decisions in *Meek* and *Wolman*, this Court should now

reject the Fifth Circuit's perpetuation of the aimless distinction between textbooks and transparencies. This Court's decisions subsequent to *Meek* and *Wolman* have undermined the assumption upon which *Meek* and *Wolman* relied. In other words, this Court has "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225. To affirm the Fifth Circuit panel's reliance on *Meek* and *Wolman* would merely serve to resurrect the now-discredited notion that religious school students may not participate in neutral and generally available government aid-to-education programs. Such a result would contradict this Court's strong legacy of government neutrality toward religion. Therefore, *Agostini*, not *Meek* and *Wolman*, should control the outcome of this case.

The importance of government neutrality toward religion to this Court's current Establishment Clause jurisprudence is seen in numerous cases guaranteeing religious groups equal access to generally available government facilities or programs. *See, e.g.*, *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 224 (1990) (Equal Access Act guaranteeing high school religious clubs equal access to meet on school facilities during noninstructional time did not violate the Establishment Clause); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (University violated Free Speech Clause by denying student religious organization which published Christian newspaper access to university funds generally

available to make payments to outside contractors for printing costs of publications of student groups).[1]

These cases demonstrate that government adheres to the requirements of both the Free Exercise and Establishment Clauses when it treats religious activity neutrally, that is, in the same manner it treats secular activity. In *Mergens*, Justice O'Connor noted:

> Indeed, the message [of equal treatment] is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

496 U.S. at 248 (plurality) (internal quotation marks and citation omitted). In *Rosenberger*, Justice O'Connor stated that "[w]e have time and again held that the government may not treat people differently based on the God or gods they worship, or don't worship. . . . The Religion Clauses prohibit the

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[1] *See also Widmar v. Vincent*, 454 U.S. 263 (1981) (university policy excluding student religious organization from using generally available university facilities violated the First Amendment); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school district violated First Amendment by denying church access to school premises solely to suppress the religious point of view the church espoused on an otherwise includible subject).

government from favoring religion, but they provide no warrant for discriminating *against* religion. . . . Neutrality, in both form and effect, is one hallmark of the Establishment Clause." 515 U.S. at 846 (internal quotation marks and citations omitted) (emphasis in original).

This Court in *Agostini* followed the principle of government neutrality toward religion when it modified "the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. A government aid-to-education program now survives Establishment Clause scrutiny if it "does not run afoul of any of the three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in government indoctrination; define its recipients by reference to religion; or create an excessive entanglement." Id. at 234.

In *Agostini* this Court examined the constitutionality of sending public school employees into private religious schools to provide remedial education under Title I, 20 U.S.C. § 6301 *et seq.* The *Agostini* Court held that Establishment Clause jurisprudence developed before and after its contrary decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985), made clear that the remedial education program under Title I did not violate the Establishment Clause. *Agostini*, 521 U.S. at 236.

Specifically, the Court in *Agostini* modified the three-part *Lemon* test, clarifying the factors relevant to the analysis of whether a government aid program has the primary effect of advancing religion. The Court analyzed the *Agostini* aid

program under three criteria derived from cases subsequent to *Meek* and *Wolman* in which this Court examined various government aid-to-education programs. Paramount to upholding the program is the principle of government neutrality toward religion which undergirds this Court's current Establishment Clause jurisprudence.

Because Chapter 2 and its Louisiana counterpart are clearly government aid programs, the statutes' constitutionality must be determined under *Agostini.* To affirm the Fifth Circuit's reliance on *Meek* and *Wolman* would produce a result contrary to this Court's strong legacy of government neutrality toward religion.

B. The Fifth Circuit Panel's Decision Demonstrates the Confusion Caused by *Meek* and *Wolman*.

This Court's embrace of a First Amendment jurisprudence undergirded by the principle of neutrality has only partially fulfilled the hope expressed by Chief Justice Burger in *Meek.* There still remains the confusing legacy of *Meek* and *Wolman.* Indeed, the Fifth Circuit as much as admitted to laboring under this confusing legacy, but declined to "take out our judicial dividing rod and try to predict, on the basis of what has been said since *Meek* and *Wolman*, what the present Court would do." *Helms,* 151 F.3d at 371.

In striking down Chapter 2 and its Louisiana counterpart, the Fifth Circuit relied solely on the distinction articulated in *Meek* and *Wolman*--that government may loan textbooks, but not other instructional materials, to religious school students--

and struck down the aid program simply because it involved supplemental instructional materials other than textbooks. *Helms,* 151 F.3d at 374. The court relied exclusively upon these two cases even though the premise upon which the decisions are based--that the character of the aid at issue was the sole determinant of the constitutionality of the program--is at odds with current Establishment Clause jurisprudence as well as principles of equal access established by this Court. The panel's decision to follow *Meek* and *Wolman* appears to be based on similarities between the aid programs at issue, coupled with admitted uncertainty as to the prevailing analytical approach for such programs. *Helms,* 151 F.3d at 372.

The confusion underlying the panel's analysis is evident throughout its opinion. For example, in a separate section of its opinion, the panel analyzed the Louisiana special education program under the three criteria articulated in *Agostini*, 151 F.3d at 362, and yet, it explicitly refused to analyze the program at bar under *Agostini*: "*Agostini* says nothing about the loan of instructional materials to parochial schools and we therefore do not read it as overruling *Meek* or *Wolman*." 151 F.3d at 374. Even after acknowledging a "post-*Agostini Lemon* test," 151 F.3d at 362, which specifically undermines the central premise upon which *Meek* relied (that "[s]ubstantial aid to the educational function of [sectarian] schools . . . *necessarily* results in aid to the sectarian school enterprise as a whole," *Meek*, 421 U.S. at 366 (emphasis added)), the court proceeded to apply *Meek* and *Wolman*, not *Agostini*.

The absence of unequivocal guidance on this subject can result only in needless perpetuation of "the denial of equal protection to children in church-sponsored schools," *Meek*, 421 U.S. at 387 (Burger, C.J., concurring in part and dissenting in part). Consequently, this Court must apply the three-part criteria articulated in *Agostini* to the government aid-to-education programs in this case. In doing so, the Court will preserve government neutrality toward religion in the distribution of government aid to education.

II. CHAPTER 2 AND ITS LOUISIANA COUNTERPART SATISFY THE THREE-PART CRITERIA ARTICULATED IN *AGOSTINI*; TO HOLD OTHERWISE WOULD ENGENDER HOSTILITY TOWARD RELIGION.

Like the remedial education program in *Agostini*, the programs here are generally available to public and nonpublic schools without reference to religion. The materials by definition are secular; extensive safeguards are in place to ensure that no school receives "religious" material. Moreover, the materials are strictly allocated according to the number of students attending the respective schools; hence, no materials reach a particular school unless a parent chooses to send his or her child to that school. Finally, the state directs no funds to religious schools under these programs. The decisions of parents direct the flow of assistance. The funds are received by the education agencies, which purchase the instructional materials and then lend them to the schools. Title to the materials remains in the education agencies.

These extensive safeguards are carefully designed to avoid Establishment Clause problems while providing all students with an equal opportunity to receive supplemental instructional materials. Under the Fifth Circuit's analysis, safeguards such as these and the neutral and generally available nature of the program are irrelevant. Religious students--*attending religious schools*--simply may not receive the same secular, supplemental instructional materials received by students in public schools. This is blatant hostility toward religion.

A. Chapter 2 Does Not Result in Government Indoctrination of Religion Because it is a Neutral Program, Offering Supplemental, Secular Materials, Generally Available to Both Public and Nonpublic Schools.

Chapter 2 of Title I and its Louisiana counterpart do not result in government indoctrination of religion.[2] The substantial safeguards discussed above ensure that all materials purchased under these programs are "secular, neutral, and nonideological." 20 U.S.C. § 7372(a)(1). Also, unlike *Agostini*

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[2] We use the word "indoctrination" under protest. "Indoctrination" is commonly viewed as teaching persons "to accept a system of thought uncritically." Webster's II New College Dictionary 565 (1995). Hence, "indoctrination" conveys the idea that religious beliefs cannot be the product of rational reflection or even spiritual inspiration, but of acquiescence to overbearing and mind-numbing repetition. "Indoctrination" also implies that religious belief cannot be defended by rational argument. It goes without saying that we disagree with both these implications. In any event, it seems clear that merely loaning secular educational materials to religious schools comes nowhere near even to government teaching, much less "indoctrination," of religion.

and *Zobrest*, these programs do not involve government employees interacting with students. The absence of live personnel significantly decreases the danger of government indoctrination of religion. Furthermore, as this Court pointed out in *Agostini*, no government teaching of religion can take place because the aid is "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted.'" 521 U.S. at 225 (citing *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (internal quotation marks and citation omitted)).

Chapter 2 aid is also limited by law to materials that "supplement, not supplant" funds expended by private schools. 20 U.S.C. §7371(b). This consideration is not a constitutional requirement. Obviously, the constitutionality of an aid program--e.g., supplying an interpreter for a deaf student as in *Zobrest*--cannot depend on the happenstance of whether the private school already could or would provide the benefit in question. *See Agostini*, 521 U.S. at 225 ("we have departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid"). Rather, this element only further highlights the fact that the governmental education assistance represents a discrete, neutral benefit to students. Finally, the government itself directs no Chapter 2 funds to religious schools, and title to materials purchased with those funds remains with the local education agency. 20 U.S.C. § 7372(c)(1). The direction of the benefits is ultimately the prerogative of parents.

B. Chapter 2 Does Not Define its Recipients by Reference to Religion Because the Program is Available on the Basis of Secular, Neutral Criteria that Neither Favor nor Disfavor Religion, and is Available to Both Public and Nonpublic Schools on a Nondiscriminatory Basis.

Important to this Court's decision to uphold the Title I program in *Agostini* was that it did not identify its recipients by reference to religion; the program in *Agostini* offered supplemental remedial instruction to *all* disadvantaged children on a neutral basis. 521 U.S. at 234-235. "The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school." *Id.* at 232. Because of the general availability of the program, the Court also held that it "does not, therefore, give aid recipients any incentives to modify their religious beliefs or practices in order to obtain those services." *Id.*

Likewise, Chapter 2 is available to *all children* in both "public and private, nonprofit schools" for the purpose of improving academic achievement. 20 U.S.C. §§ 7312 & 7351(b)(2). The "aid is allocated on the basis of a neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U.S. at 231. Once Louisiana receives its Chapter 2 funds from the federal government, the state education agency allocates eighty percent of the funds to the local education agencies (LEAs). "Eighty-five percent of those funds are earmarked for LEAs based on the number of

participating elementary and secondary school students in both public and private, nonprofit schools. 15% go to LEAs based on the number of children from low-income families." *Helms*, 151 F.3d at 367-68.

As a result, like the programs at issue in *Witters* and *Agostini*, any Chapter 2 benefit to religious schools is indirect and purely a "result of the genuinely independent and private choices of individuals." 521 U.S. at 226 (internal quotation marks and citations omitted). Government has no discretion as to where the funds go and, consequently, no ability to promote religion. In short, the funds follow the children.

In her concurring opinion in *Witters*, Justice O'Connor emphasized the importance of generally and neutrally available aid: "[S]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries." 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment) (internal quotation marks and citation omitted). *See also Mueller v. Allen*, 463 U.S. 388, 397 (1983) ("Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools") (emphasis in original).

The Ninth Circuit's analysis in *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995), although pre-*Agostini*, recognized the neutral and general nature of Chapter

2 and upheld the program under relevant principles of "government neutrality towards religion." *Id.* at 1466. Evaluating a Chapter 2 program that was, in all relevant respects, identical to the one in this case, the Ninth Circuit found it constitutional on grounds similar to the criteria later prescribed in *Agostini*. Remarking that "Chapter 2 benefits are neutrally available without regard to religion" and "supplementary and cannot supplant the basic educational services of the religious schools," the Ninth Circuit held that "Chapter 2 . . . does not act as a subterfuge to channel money to religious schools, but rather, it resembles other governmental programs deemed constitutional due to the general applicability of benefits conferred." 46 F.3d at 1467.

This Court should similarly find that Chapter 2 and its Louisiana counterpart are constitutional because the primary effect of the programs "is to improve education for *all* school children." *Id.* at 1649 (emphasis in original).

C. Chapter 2 and its Louisiana Counterpart Do Not Create an Excessive Entanglement.

Annual monitoring visits by local school district employees, their attendant screening of instructional materials, and visits from state monitors once every two years is clearly less intrusive than the monthly visits held in *Agostini* to not constitute excessive entanglement. *Id.* at 234.

Consequently, Chapter 2 and its Louisiana counterpart are constitutional under this Court's Establishment Clause jurisprudence and the analysis for government aid-to-education

programs set forth in *Agostini*. To hold otherwise would be to ignore this Court's maxim of government neutrality towards religion.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

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Dated: August 19, 1999.